

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**CATALINA MUNGARAY**

Claimant

V.

**TYSON FRESH MEATS, INC.**

Self-Insured Respondent

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Docket No. 1,065,292

**ORDER**

Claimant requested review of the December 17, 2014, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on May 5, 2015.

**APPEARANCES**

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. Gregory D. Worth, of Kansas City, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ found claimant failed to provide timely notice of injury by repetitive trauma and denied compensation.

Claimant appeals, but did not file a brief in support of her application for review.

Respondent argues the Award should be affirmed.

The issue on appeal is whether claimant provided timely/proper notice of injury by repetitive trauma that resulted in right upper extremity carpal tunnel syndrome.

**FINDINGS OF FACT**

This claim is for repetitive trauma allegedly sustained as claimant performed jobs for respondent from September 29, 2011, to her last date of work on November 20, 2012. Claimant requests benefits for the treatment of right carpal tunnel syndrome.

Claimant claims she suffered injury to her right hand, fingers and palm while at work on September 29, 2011, with the symptoms getting worse as she continued to work, until her last day of work. Claimant contends she told everyone about her hand and that no one provided her with any treatment.

After September 29, 2011, claimant packed honeycombs and hooked up clothes that had been washed for respondent. Claimant used both hands to do this work. When claimant stopped working for respondent it was because of a different, unrelated health condition. Claimant acknowledged the only accident she reported at work was for a right shoulder injury.

Claimant was not diagnosed with carpal tunnel syndrome until undergoing a nerve conduction study for her shoulder on April 15, 2013. After this, she filed this claim for carpal tunnel syndrome. Claimant acknowledges the first notice provided respondent for this claim occurred on April 26, 2013, when respondent received the demand letter from her attorney.

Claimant met with John Simpson Woodward, Jr., M.D., on several occasions for treatment of her right shoulder injury. On June 7, 2012, after right shoulder surgery, she complained of nonspecific symptoms in her right hand and forearm. This was the first record of symptoms in the hand and forearm as the focus had been on the shoulder. Dr. Woodward told claimant he did not believe the symptoms in her hand were related to her workers compensation claim or to the right shoulder surgery. At the time, he felt these symptoms might be radicular in nature and emanating from the neck.

Q. Doctor, given your treatment of Ms. Mungaray over time for injuries sustained in the September 29, 2011 accident producing her shoulder injury, do you have an opinion stated within a reasonable degree of medical probability as to whether or not that same accident produced traumatic carpal tunnel syndrome for Ms. Mungaray in the right upper extremity?

A. There is no evidence presented to me to suggest that the work-related injury resulted in a carpal tunnel syndrome diagnosed on 5 -- in April 2013.

Q. You mentioned while going through your treatment of Ms. Mungaray that she did have some nonspecific symptoms in her hand and wrist when you saw her on June 7 of 2012. Does that finding or that report alter in any way the testimony you just gave regarding causation for carpal tunnel syndrome?

A. No.<sup>1</sup>

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<sup>1</sup> Woodward Depo. at 21-22.

At the request of her attorney, claimant met with C. Reiff Brown, M.D., for an examination on November 13, 2013, at which time she complained of carpal tunnel syndrome symptoms occurring six months prior to her shoulder surgery. Claimant believed the carpal tunnel syndrome was from the repetitious use of her right hand. She reported numbness, weakness and intermittent swelling involving her right hand and wrist, depending on her level of physical activity.

Dr. Brown diagnosed right rotator cuff syndrome with severe acromial impingement, chronic cervical sprain, myofascial pain syndrome and right carpal tunnel syndrome, all the result of claimant's work activity. The repetitive nature of claimant's injury was demonstrated by history and the physical examination. Dr. Brown opined claimant's employment exposed her to an increased risk not present with normal non-employment life. The increased risk from her employment was the prevailing factor causing the repetitive trauma. The repetitive trauma was the prevailing factor in causing claimant's present medical condition and impairment.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.A.R. 51-18-2 states:

- (a) The effective date of the administrative law judge's acts, findings, awards, decisions, rulings, or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge.
- (b) Application for review by the workers compensation board shall be considered as timely filed only if received in the central office or one of the district offices of the division of workers compensation on or before the tenth day after the effective date of the act of an administrative law judge.
- (c) An application for review may be filed by facsimile directly to the division of workers compensation.

At oral argument respondent asked the Board to prohibit claimant from making oral argument because claimant's counsel did not file a brief. Respondent argued that not filing a brief put respondent at a disadvantage because respondent did not know claimant's position on the issues. The Board declined respondent's request, noting there is currently no requirement for a party to file a brief to the Board. K.A.R. 51-18-2 contains no provision allowing the Board to impose a penalty upon a party for failure to file a brief. In *Salvador*,<sup>2</sup> another case in which claimant's counsel did not file a brief on behalf of his client, the Board stated:

The best practice for parties appearing before the Board is to timely file briefs. Filing briefs should not be viewed as a burden, but rather an opportunity for parties to present their arguments and authorities to the Board in advance of oral argument.

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<sup>2</sup> *Salvador v. Tyson Fresh Meats, Inc.*, No. 1,043,100, 2015 WL 996890 (Kan. WCAB Feb. 11, 2015).

Moreover, filing a brief is a simple courtesy to opposing counsel and the Board. If the Board had authority to require parties to file briefs and enforce that requirement, it would do so. However, the Board has no such authority.<sup>3</sup>

K.S.A. 2012 Supp. 44-520(a)(1) states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

Claimant acknowledged the only notice of accident personally given to respondent pertained to a separate September 29, 2011, accident to her right shoulder, the subject of Docket No. 1,064,137. Claimant agreed she never gave notice to respondent of an alleged claim for repetitive trauma or for the separate diagnosis of carpal tunnel syndrome. The only notice to respondent of this right upper extremity carpal tunnel syndrome claim came with the April 26, 2013, claim letter sent by her attorney.

At oral argument to the Board, claimant's attorney argued equity required an award be allowed in this matter because claimant was unable to satisfy the requirements of the notice statute due to the diagnosis of carpal tunnel syndrome not being made until the April 2013 EMG diagnosis. That study was connected to the claim made by claimant for the injury to her right shoulder. The ALJ, in that claim, denied claimant's contention that the carpal tunnel syndrome was connected to the shoulder injury. That matter went to an Award and no appeal was taken therefrom. However, equity is not a doctrine contained in the Kansas Workers Compensation Act, (Act) which is complete in itself.<sup>4</sup>

The Act was heavily amended in 2011. The changes and restrictions placed in the Act by the Kansas Legislature regarding the timeliness of notice are specific and clear. Claimant's last day worked for respondent was November 20, 2012. Claimant had only 20 days to provide notice of the carpal tunnel syndrome from that date. Claimant failed to do so. The denial of benefits for this claimed series of trauma is affirmed.

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<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Jones v. Continental Can Co.*, 260 Kan. 547, 920 P.2d 939 (1996).

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant failed to provide timely notice of her alleged repetitive trauma occurring through her last day worked.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated December 17, 2014, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge